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No. 03-445

In the Supreme Court of the United States

JOSE LUIS PERDOMO-PADILLA, PETITIONER

v.

JOHN D. ASHCROFT, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's filing of an application for naturalized United States citizenship changed his immigration status from that of an alien to that of a national of the United States.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	7
Conclusion	14

TABLE OF AUTHORITIES

Cases:

Carreon-Hernandez v. *Levi*, 543 F.2d 637 (8th Cir. 1976), cert. denied, 430 U.S. 957 (1977)	10
Hampton v. *Mow Sun Wong*, 426 U.S. 88 (1976)	4
Hughes v. *Ashcroft*, 255 F.3d 752 (9th Cir. 2001)	7
Johnson v. *Eisentrager*, 339 U.S. 763 (1950)	13
Miller v. *Albright*, 523 U.S. 420 (1998)	4, 8
Navas-Acosta, In re, 23 I. & N. Dec. 586 (BIA 2003)	4
Oliver v. *INS*, 517 F.2d 426 (2d Cir. 1975), cert. denied, 423 U.S. 1056 (1976)	10
Rogers v. *Bellei*, 401 U.S. 815 (1971)	2
Salim v. *Ashcroft*, No. 02-2244, 2003 WL 22751083 (3d Cir. July 15, 2003)	12
Shomberg v. *United States*, 348 U.S. 540 (1955)	9
United States v. *Morin*, 80 F.3d 124 (4th Cir. 1996)	7, 8, 10, 11, 12

Statutes and regulations:

Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135:	
§ 441(2), 116 Stat. 2192 (to be codified at 6 U.S.C. 251(2))	2
§ 451(b), 116 Stat. 2196 (to be codified at 6 U.S.C. 271(b))	2

Statutes and regulations—Continued: Page

Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.* 1
8 U.S.C. 1101(a)(3) 2
8 U.S.C. 1101(a)(22) 2, 3, 4, 7, 8, 11, 12, 13
8 U.S.C. 1101(a)(22)(B) 4, 6, 8, 9, 10, 12
8 U.S.C. 1101(a)(23) 2, 5, 9
8 U.S.C. 1101(a)(29) 8
8 U.S.C. 1101(a)(43)(B) 3
8 U.S.C. 1227(a) 1
8 U.S.C. 1227(a)(2)(A)(iii) 2
8 U.S.C. 1227(a)(2)(B)(i) 2
8 U.S.C. 1252(b)(2) 3
8 U.S.C. 1408 ..... 5, 8, 10
8 U.S.C. 1408(1)-(4) 5
8 U.S.C. 1429 ..... 6, 7, 9, 13
8 U.S.C. 1436 10
8 U.S.C. 1481 6
8 U.S.C. 1481(a) 9
18 U.S.C. 1968(a) 11
18 U.S.C. 2331(2) 11
18 U.S.C. 2332(a) 11
21 U.S.C. 841(a)(1) 2
21 U.S.C. 846 2
8 C.F.R.:
Pt. 325 10
Pt. 335:
Section 335.10 9
Pt. 337:
Sections 337.1-337.3 9
14 C.F.R. 1259.101(c) 8

Miscellaneous:

Aliens and Nationality; Homeland Security; Reorganization of Regulations, 68 Fed. Reg. 9830-9846 (2003) (to be codified at 8 C.F.R. Pts. 1001-1337) 2

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-15) is reported at 333 F.3d 964. The order of the Board of Immigration Appeals (Pet. App. 16-17) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 23, 2003. The petition for a writ of certiorari was filed on September 22, 2003 (a Monday).

STATEMENT

1. Under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, certain classes of aliens are subject to removal from the United States. See 8 U.S.C. 1227(a). The INA defines the term "alien" to mean "any person not a citizen or national of the United

States." 8 U.S.C. 1101(a)(3). Under 8 U.S.C. 1101(a)(22), "[t]he term 'national of the United States' means (A) a citizen of the United States, or (B) a person who, though not a citizen of the United States, owes permanent allegiance to the United States."

2. Petitioner is a native and citizen of Mexico who was admitted to the United States as a lawful permanent resident alien in 1982. Pet. App. 2-3. In July 1997, petitioner filed with the Immigration and Naturalization Service (INS) an Application for Naturalization as a citizen of the United States, on which he answered "yes" to a series of questions, including the question whether he was "willing to take the full Oath of Allegiance to the U.S." *Id.* at 3.[1]

In October 1999, petitioner was convicted in federal district court, after a guilty plea, of conspiring to distribute marijuana, in violation of 21 U.S.C. 841(a)(1) and 846. Petitioner was sentenced to a term of imprisonment of 30 months, to be followed by four years of supervised release. A.R. 85-88.

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[1] Naturalized citizenship is citizenship that is conferred after birth. See generally *Rogers* v. *Bellei*, 401 U.S. 815, 822 (1971); see also 8 U.S.C. 1101(a)(23) (defining "naturalization" for purposes of INA). On March 1, 2003, functions of several border and security agencies, including certain functions of the former INS, were transferred to the Department of Homeland Security. See Homeland Security Act of 2002, Pub. L. No. 107-296, §§ 441(2), 451(b), 116 Stat. 2192, 2196 (to be codified at 6 U.S.C. 251(2), 271(b)). The Attorney General remains responsible for the administrative adjudication of removal cases by immigration judges and the Board of Immigration Appeals. See *Aliens and Nationality; Homeland Security; Reorganization of Regulations*, 68 Fed. Reg. 9830-9846 (2003) (to be codified at 8 C.F.R. Pts. 1001-1337) (Justice Department implementing regulations as recodified after Homeland Security Act).

3. In January 2001, the INS commenced removal proceedings against petitioner based on his drug-trafficking conviction. Pet. App. 3; see 8 U.S.C. 1101(a)(43)(B), 1227(a)(2)(A)(iii) and (B)(i). In March 2001, an immigration judge (IJ) determined that petitioner is removable from the United States as charged by the INS, and ordered petitioner removed to Mexico. Pet. App. 3; see A.R. 37-38.

In his administrative appeal to the Board of Immigration Appeals (BIA), petitioner argued that he was not an alien, but rather a national of the United States (and therefore not subject to removal) by virtue of his pending application for naturalized citizenship. Pet. App. 16. In August 2001, the BIA dismissed petitioner's appeal. The BIA determined that petitioner's claim to be a national of the United States had not been presented to the IJ and the IJ had not ruled upon it and, therefore, the claim was not properly before the BIA. *Id.* at 16-17. The BIA further concluded that petitioner's claim of United States nationality failed because, in his removal proceeding, petitioner submitted no evidence that he actually applied for naturalization. *Id.* at 17.[2]

4. The Ninth Circuit denied petitioner's ensuing petition for review. Pet. App. 1-15. The court of appeals concluded that, under 8 U.S.C. 1101(a)(22), a person who is not a national of the United States at birth may become a national of this country only through a grant of naturalization as a citizen and not, as petitioner

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[2] The BIA also determined that petitioner's argument was not supported by any decisions of the Third Circuit, where the BIA apparently believed petitioner's case arose. In fact, petitioner's case was heard by an IJ within the Ninth Circuit and, therefore, judicial review was in the Ninth Circuit. See 8 U.S.C. 1252(b)(2).

argued, by submitting an application for naturalization that contains a statement of willingness to take an oath of allegiance to the United States. Pet. App. 4.

The court of appeals declined to defer to the BIA's determination, in a decision issued after the decision in petitioner's case, that United States nationality may be acquired under the INA only at birth or through a grant of naturalized citizenship. Pet. App. 5 (discussing *In re Navas-Acosta*, 23 I. & N. Dec. 586 (BIA 2003)). Nevertheless, the court independently reached the same conclusion.

The court of appeals first observed that although all citizens of the United States are nationals of the United States, some United States nationals are not United States citizens. Historically, non-citizen nationals have been persons born in outlying territories of the United States (currently, American Samoa and Swains Island). Pet. App. 6-7 (citing, *inter alia*, *Miller* v. *Albright*, 523 U.S. 420, 467 n.2 (1998) (Ginsburg, J., dissenting); *Hampton* v. *Mow Sun Wong*, 426 U.S. 88, 90 n.1 (1976)). The court determined that the text and structure of the INA are consistent with that traditional understanding that the term "national," when used to describe non-citizens, refers generally to persons born in territories of the United States, and not applicants for naturalized citizenship. Pet. App. 8.

The court emphasized (Pet. App. 8-9) that, under 8 U.S.C. 1101(a)(22), a United States national who is not a citizen of the United States must "owe[] permanent allegiance to the United States." 8 U.S.C. 1101(a)(22)(B). Applicants for naturalized citizenship cannot satisfy that requirement, the court explained, because an application for naturalization "does not require the applicant presently to pledge permanent allegiance to the United States," but rather asks whether the alien is "*willing* to

take the full Oath of Allegiance" in the future. Pet. App. 8 n.4 (internal quotation marks omitted). Thus, the court continued, an alien whose naturalization application is withdrawn or denied will not take the oath of allegiance, and could withdraw any statement of prospective intent to take an oath of allegiance that was made in the naturalization application. *Id.* at 8-9 & n.4.

The court of appeals next relied on 8 U.S.C. 1101(a)(23), which provides that "[t]he term 'naturalization' means the conferring of nationality of a state upon a person after birth, by any means whatsoever." The court noted that "Section 1101(a)(23) makes no provision for the attainment of nationality short of full naturalization and, therefore, is consistent with our conclusion that one may become a 'national of the United States' only through birth or by completing the process of becoming a naturalized citizen." Pet. App. 10.

The court "f[ou]nd further support" for its rejection of petitioner's argument in 8 U.S.C. 1408. Pet. App. 10. Section 1408 identifies four categories of persons who are "nationals, but not citizens, of the United States at birth": (1) persons born in an outlying possession of the United States; (2) persons born abroad to parents who are non-citizen nationals of the United States and who met a requirement of residency in the United States or an outlying possession at the time of the birth; (3) certain persons of unknown parentage found in an outlying possession of the United States; and (4) persons born outside the United States and its outlying possessions to one parent who is an alien and one parent who is a qualifying non-citizen national of the United States. 8 U.S.C. 1408(1)-(4). The court of appeals observed that Congress's listing of those *birthright* non-citizen nationals, without identifying any category of persons who

can attain the status of a non-citizen national *after birth*, "is significant" in this case. Pet. App. 10.

Next, the court observed (Pet. App. 11) that 8 U.S.C. 1481 specifies certain acts (such as obtaining foreign naturalization or serving in a foreign army that is engaged in hostilities against the United States) that, if voluntarily performed by "[a] person who is a national of the United States *whether by birth or naturalization*," terminate United States nationality. 8 U.S.C. 1481 (emphasis added). The court noted that Section 1481, "[b]y mentioning only birth and naturalization as reasons why a person would be a national of the United States, * * * implies that those are the *only* ways in which a person can attain the status of a national." Pet. App. 11.

Finally, the court of appeals pointed to 8 U.S.C. 1429 as a further demonstration that Congress did not intend for aliens who apply for naturalization to be treated, on that basis, as nationals of the United States. Pet. App. 11. Section 1429 states in pertinent part that "no person shall be naturalized against whom there is outstanding a final finding of deportability * * * ; and no application for naturalization shall be considered * * * if there is pending against the applicant a removal proceeding." 8 U.S.C. 1429. The court of appeals determined that "[t]he natural reading of this statute is that removal proceedings and final removal orders are to take precedence over naturalization applications. Because the INA permits the removal of aliens only, and § 1429 allows the removal of individuals with pending naturalization applications," the court continued, "it is clear that Congress viewed applicants for naturalization as aliens and not as nationals." Pet. App. 11. The court noted that, in light of Section 1429, petitioner's reading of Section 1101(a)(22) "would

paralyze" the removal process. *Ibid.* Aliens could file naturalization applications after removal proceedings already had begun, and thereby become nationals ineligible for removal. *Ibid.* Those naturalization applications, moreover, could not be granted, because Section 1429 forbids the naturalization of an alien who is in removal proceedings. Thus, nonsensically, there would be a category of aliens in removal proceedings who could be neither removed nor granted citizenship. *Id.* at 11-12.

The Ninth Circuit rejected (Pet. App. 12-13) petitioner's argument that he is a national of the United States under *Hughes* v. *Ashcroft*, 255 F.3d 752 (9th Cir. 2001). The court of appeals explained that in *Hughes* it had "expressly declined to decide whether an application for naturalization, standing alone, is sufficient to confer nationality on an alien." Pet. App. 13 (citing *Hughes*, 255 F.3d at 757). Although the court of appeals noted that a Fourth Circuit case, *United States* v. *Morin*, 80 F.3d 124 (1996), supports petitioner's construction of Section 1101(a)(22), the Ninth Circuit found *Morin* unpersuasive due to the absence of reasoning in that decision. Pet. App. 14. The Ninth Circuit further concluded (*id.* at 15) that district court cases cited by petitioner either contradict his claim to be a national of the United States or, like *Morin*, did not address the relevant statutory considerations when interpreting Section 1101(a)(22).

ARGUMENT

The Ninth Circuit correctly determined that the filing of an application for naturalized citizenship does not transform the alien applicant into a national of the United States. That determination is compelled by the language and structure of the immigration laws and

consistent with the interpretation of the Board of Immigration Appeals, see Pet. App. 5-6. It does not conflict with any decision of this Court. The conflict between the instant decision (and a more recent Third Circuit decision) and *United States* v. *Morin*, 80 F.3d 124 (4th Cir. 1996), should have little or no continuing significance, for reasons discussed below. Further review by this Court is not warranted.

1. The Ninth Circuit has correctly interpreted Section 1101(a)(22). As the court of appeals explained (Pet. App. 6-8), petitioner's argument that an applicant for naturalized citizenship who expresses willingness to take an oath of allegiance is a "national" of the United States is contrary to the ordinary understanding—reflected in this Court's decisions, see *ibid.* (citing cases), as well as administrative regulations, see *id.* at 12 (quoting 14 C.F.R. 1259.101(c))—that a non-citizen national of the United States is a person who has been born in an outlying territorial possession of the United States. See 8 U.S.C. 1408 (identifying persons who are "nationals, but not citizens, of the United States at birth" by reference to "outlying possessions" of the United States); 8 U.S.C. 1101(a)(29) (defining "outlying possession" to mean American Samoa and Swains Island); see also *Miller* v. *Albright*, 523 U.S. 420, 467 n.2 (1998) (Ginsburg, J., dissenting).

Petitioner's argument likewise finds no support in the "plain language" (Pet. 14, 15) of Section 1101(a)(22). Section 1101(a)(22)(B) provides that a non-citizen national is someone "who *owes permanent allegiance* to the United States." 8 U.S.C. 1101(a)(22)(B) (emphasis added). Although petitioner stated in his application for naturalized citizenship that he would be "willing to take the full Oath of Allegiance to the U.S.," Pet. App. 3, he has not taken that oath, which would be adminis-

tered (generally in a public ceremony) after a determination of eligibility for citizenship and as part of the formal conferral of citizenship, see 8 C.F.R. 337.1-337.3. It is only at that point that a person loses his status as an alien and transfers his obligations of citizenship and allegiance from his former country of citizenship to the United States. Moreover, in light of the possibility that a naturalization application will be denied or withdrawn, see 8 C.F.R. 335.10, petitioner could not demonstrate, through the mere filing of an application for naturalization, that he owes "permanent allegiance to the United States" under Section 1101(a)(22)(B).

Petitioner's contention that he is a national of the United States conflicts with other provisions of the INA that the court of appeals identified. See Pet. App. 10-12. For example, if petitioner were correct and the pendency of a naturalization application rendered him a national who cannot be removed, then, under 8 U.S.C. 1429, aliens could defeat their removal proceedings by filing naturalization applications (which, also under Section 1429, immigration officials could not process). See Pet. App. 11-12; see also *Shomberg* v. *United States*, 348 U.S. 540 (1955) (applying Section 1429).

Petitioner's argument also is inconsistent with the INA's definition of "naturalization," which means "the conferring of nationality" after birth. 8 U.S.C. 1101(a)(23). If naturalization applications conferred nationality, then, nonsensically, *applicants* for naturalized citizenship would acquire "naturalization" just by applying for it, without any approval or conferral by the government. See Pet. App. 10. Similarly, petitioner's claim that his application for naturalization conferred nationality is at odds with 8 U.S.C. 1481(a), in which Congress referred to the acquisition of the status of a national "by birth or naturalization," without men-

tioning the filing of a naturalization application as a basis for United States nationality. See Pet. App. 11. And, likewise, if petitioner were correct that naturalization applications suffice to confer nationality, then Congress logically would have listed applicants for naturalized citizenship along with birthright nationals as "nationals, but not citizens, of the United States" in 8 U.S.C. 1408. See Pet. App. 10; see also 8 U.S.C. 1436 (providing for naturalization of non-citizen nationals); 8 C.F.R. Pt. 325 (same).

2. Contrary to petitioner's assertions (Pet. 10-13), there is no circuit conflict that warrants this Court's review. The instant decision does not conflict with either *Carreon-Hernandez* v. *Levi*, 543 F.2d 637 (8th Cir. 1976), cert. denied, 430 U.S. 957 (1977), or *Oliver* v. *INS*, 517 F.2d 426 (2d Cir. 1975) (per curiam), cert. denied, 423 U.S. 1056 (1976). Neither of those decisions presented the question in this case, *i.e.*, whether the filing of an application for naturalization demonstrates permanent allegiance to the United States. Instead, the Second and Eighth Circuits determined that aliens who had *not* applied for naturalized citizenship lacked permanent allegiance to the United States under Section 1101(a)(22)(B). See *Carreon-Hernandez*, 543 F.2d at 637-638; *Oliver*, 517 F.2d at 427-428 & n.3. The Second Circuit, moreover, explained in *Oliver*—consistent with the Ninth Circuit's reasoning in this case—that nationality can be established "only at birth; thereafter the road [to changing alien status] lies through naturalization, which leads to becoming a citizen and not merely a 'national.'" *Id.* at 428.

Petitioner does correctly identify (Pet. 11-12) a conflict between the instant decision and *United States* v. *Morin*, 80 F.3d 124 (4th Cir. 1996), concerning the interpretation of Section 1101(a)(22)(B). *Morin* was a crimi-

nal case in which the charges included murder-for-hire, in violation of 18 U.S.C. 1958(a). Section 1958(a) requires, *inter alia*, "intent that a murder be committed in violation of the laws of any State or the United States." To establish that element of the offense, the government argued that the defendant attempted to arrange a murder in the Philippines that would have violated several Virginia murder and conspiracy statutes. Gov't Br. at 10-11, *Morin*, *supra* (Nos. 95-5242 & 95-5300) (*Morin* Br.). In addition, the government defended the district court's determination that the planned murder would have violated 18 U.S.C. 2332(a), which makes it a federal offense to murder a national of the United States who is outside the United States. The government argued that, as used in Section 2332(a) of the Criminal Code, the term 'national' should be understood to include an individual, such as the intended target of Morin's murder plot, who is a lawful permanent resident alien. *Morin* Br. at 12. In a footnote, the government stated that its interpretation of Section 2332(a) "comports with the general definition of 'national' contained in [Section 1101(a)(22)]," which is incorporated into Section 2332(a) through 18 U.S.C. 2331(2). *Morin* Br. at 12 n.3. To support that last point, the government stated, incorrectly, that "given [the intended victim's] pending application for citizenship, it can fairly be said that he owed allegiance to the Untied (*sic*) States." *Ibid.*

The Fourth Circuit agreed with the government that the planned killing in *Morin* would have violated both Virginia law and 18 U.S.C. 2332(a). 80 F.3d at 126-127. In discussing Section 2332(a), the court stated that Morin's intended victim was a national of the United States because he was a permanent resident alien with a pending application for naturalized citizenship. The

Fourth Circuit reasoned, without any citation, that "an application for citizenship is the most compelling evidence of permanent allegiance to the United States short of citizenship itself." *Id.* at 126.

The Fourth Circuit's consideration of Section 1101(a)(22) was unnecessary to the holding in *Morin* because the planned murders also would have violated Virginia law. Moreover, although consistent with the government's alternative argument in that case, the Fourth Circuit's approach is incorrect for the reasons discussed in Point 1, above. In a decision that is designated for publication, the Third Circuit, expressly agreeing with the Ninth Circuit in this case, rejected the reasoning of *Morin* as "wholly unpersuasive" and concluded that "simply filing an application for naturalization does not prove that one 'owes a permanent allegiance to the United States.'" *Salim* v. *Ashcroft*, No. 02-2244, 2003 WL 22751083, at *2 (3d Cir. July 15, 2003) (per curiam). Furthermore, representatives of the United States Attorneys in every circuit, as well as appropriate attorneys within the Criminal Division of the Department of Justice, are being advised of the position stated in this brief concerning *Morin*'s incorrect application of Section 1101(a)(22)(B). Accordingly, no criminal prosecutions should be brought based on the interpretation of "national" stated in *Morin*.

In light of all those considerations, the Fourth Circuit's decision in *Morin* is unlikely to have future significance, and—given the powerful statutory arguments, not considered in *Morin*, why someone in petitioner's position does not qualify as a national—can be expected to be reconsidered by the Fourth Circuit in a removal case under the immigration laws. *Morin* thus

does not establish a circuit conflict that warrants review by this Court.[3]

3. Finally, petitioner suggests (Pet. 16) that the Ninth Circuit's decision in this case might allow immigration officials to "defeat Congressional intent to insulate from removal citizens and nationals by sitting on legitimate applications" for naturalized citizenship. Petitioner's argument seems to be that Congress wanted to protect from removal those criminal and other aliens who are removable but who have applied for naturalized citizenship. Section 1429 disproves that argument. See pp. 6-7, 9, *supra*. Nor is there any indication of improper agency delay in this case. In briefing his case before the BIA, petitioner acknowledged that the processing of his citizenship application may have been delayed or prevented "due to the fact that [petitioner] moved with his family" while the application was pending "and failed to notify the INS of his change of address." A.R. 9-10. After petitioner's drug conviction in 1999, moreover, the INS had clear grounds for declining to grant petitioner citizenship and, instead, commencing the removal proceedings that are at issue in this case.[4]

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[3] The district court decisions on which petitioner relies (Pet. 16-17) do not add meaningfully to the split of authority in the lower courts. None contains substantial analysis of Section 1101(a)(22), and some held that the alien was *not* a national of the United States. There was no issue of United States nationality at all in *Johnson* v. *Eisentrager*, 339 U.S. 763 (1950), on which petitioner also relies. See Pet. 13 n.5.

[4] Although the court of appeals considered the merits of petitioner's claim to be a national of the United States, the BIA determined (Pet. App. 16-17) that petitioner could not prevail on that argument because, among other reasons, he failed to (1) present it to the immigration judge in his removal proceeding and (2) provide

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 2003

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the BIA with record evidence establishing that he applied for naturalization. *Id.* at 17. Although the court of appeals, on February 28, 2003, granted petitioner's motion to take judicial notice of his July 1997 naturalization application, those additional grounds for the BIA's order of removal nevertheless weigh against this Court's review of the nationality issue framed in the petition.